Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges	)	WC Docket No. 02-361
	)	

REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC.

Daniel Waggoner
Suzanne Toller
Gregory Kopta
Davis Wright Tremaine LLP
1501 Fourth Avenue, Suite 2600
Seattle, WA 98101
Tel.: (206) 622-3150
Fax: (206) 628-7699

Attorneys for AT&T Wireless Services, Inc.

Douglas I. Brandon
Vice President – Legal and External Affairs
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W., 4th Floor
Washington, DC 20036
Tel. (202) 223-9222

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AT&T Wireless Services, Inc. ("AWS") provides the following reply comments on AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges ("Petition"). AT&T's Petition provides further evidence of why the FCC's current intercarrier compensation regime is unworkable in today's rapidly evolving communications market. The relief that AT&T requests in this proceeding for voice over Internet protocol ("VoIP") services represents a step in the right direction toward the bill and keep intercarrier compensation that the Commission has proposed (and AWS has supported).

In direct response to AT&T's Petition, the Commission should not find any of AT&T's services to be subject to switched access charges. To do so based on this incomplete record would add to rather then to diminish the current confusion in defining and applying the line between "telecommunications" and other services.

In addition, the Commission should deny the requests of certain incumbent local exchange carriers ("ILECs") that the Commission declare that a wide range of services are "telecommunications services" subject to ILEC switched access charges. These requests are significantly outside the scope of this proceeding, would require the Commission to reverse its earlier decisions on these issues, and would impact a number of services not at issue in the Petition, including wireless 3G services. This type of broad-sweeping change in policy and precedent simply cannot be granted with the limited record and participation in this proceeding. Such a reconsideration, if it were to occur at all, should only occur based upon a full record and adequate notice to all interested parties.

DISCUSSION

AT&T's Petition highlights yet another problem with the Commission's inter-carrier compensation scheme. This proceeding serves to underscore the propriety of Commission's tentative conclusion in the intercarrier compensation docket that all traffic should be exchanged between carriers on a "bill and keep" basis.[1] AWS supported and continues to support that conclusion,[2] as apparently does Qwest.[3] Several other ILECs have proposed that the issues raised in AT&T's Petition be addressed in that docket.[4] Unfortunately, the ILECs do not confine themselves to those recommendations. Rather, the ILECs attempt to justify – and obtain Commission support for – broad imposition of switched access charges on services using Internet protocol ("IP"), not only on the VoIP services provided by AT&T, but on "all IP telephony service – whether classified as information services or telecommunications services."[5] The Commission's existing rules, policies, and prior decisions do not support this position. These ILEC proposals,

[1] *In re Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92.

[2] *Id*., AWS Comments and AWS Reply Comments.

[3] Comments of Qwest Communications International, Inc., at 22-23.

[4] *E.g.*, National Telecommunications Cooperative Association Initial Comments at 7-8.

[5] Opposition of SBC Communications, Inc., at 13.

moreover, stray far a field from the issues raised in AT&T's Petition, and the Commission should consider those proposals, if at all, only in a broader investigation that develops a full record on the variety and status of various services that may be considered "telecommunications".

1. A Carrier's Use of a LEC's Facilities to Deliver Traffic Does Not Necessarily Entitle the LEC to Compensation From That Carrier.

AT&T correctly asserts that its VoIP services are routed over the same facilities that are used to route traffic between computers on the Internet, making those services comparable to the enhanced services the Commission has exempted from payment of switched access charges. The ILECs, in contrast, assert that AT&T's VoIP services use ILEC circuit switched originating and terminating facilities, regardless of how the traffic is routed in between those facilities, and the Commission has required compensation to ILECs for such use in the form of switched access charges. But the ILECs ignore the fact that the Commission does not necessarily permit a local exchange carrier ("LEC") to collect compensation from other carriers for their use of the LEC's facilities to deliver traffic, particularly when that traffic is related to the Internet. They also disregard the fact that such compensation need not be set at the level of access charges.

A prime example of this Commission policy is compensation for traffic bound for Internet Service Providers ("ISPs"). An ILEC whose end-user customers use ISPs served by a competitive local exchange carrier ("CLEC") unquestionably uses CLEC switching and last mile facilities – in most cases, the very same type of facilities that the ILECs provide for AT&T's use in terminating its VoIP services. CLECs unquestionably incur costs to deliver traffic from ILEC subscribers to the CLEC ISP subscribers, presumptively the same costs that the ILECs incur to terminate AT&T's VoIP services.[6] Yet in its most recent order on intercarrier compensation for ISP-bound traffic, the Commission concluded that "the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users."[7] While the Commission authorized interim intercarrier compensation for some ISP-bound traffic,[8] LECs – particularly CLECs – are required to deliver a substantial portion of ISP-bound traffic without compensation from the carrier – usually the ILEC – whose customers originated that traffic.[9]

The ILECs' uniform failure even to acknowledge this Commission decision in their comments in this docket is all the more disingenuous because those same ILECs have steadfastly maintained that CLECs are not entitled to *any* intercarrier compensation for ISP-bound traffic. Indeed, the Commission, in the context of intercarrier compensation for ISP-bound traffic, rejected the very arguments that the ILECs make here – that a LEC necessarily is entitled to compensation from other carriers who use the LEC's facilities to route traffic originated by their subscribers. The mere fact that AT&T's VoIP services make use of ILEC facilities, therefore, has not been, and should not be, determinative of whether, and what kind of, intercarrier compensation is due for that use.

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[6] *See* 47 C.F.R. 51.711.

[7] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, Order on Remand and Report and Order, para. 4 (rel. April 27, 2001).

[8] Such compensation, moreover, is almost uniformly less than the reciprocal compensation rate applicable to the exchange of local traffic which, in turn, is well below the ILECs' switched access rates applicable to interexchange traffic.

[9] Such uncompensated ISP-bound traffic includes, for example, traffic that exceeds the growth caps established by the Commission, as well as traffic for which a carrier was not entitled to compensation prior to the effective date of the Commission's order. *See, e.g., id*. para. 8.

2. The Commission Has Not Defined, and Should Not Define, VoIP Services as Telecommunications Services Necessarily Subject to ILEC Switched Access Charges.

Both AT&T and the ILECs rely on the Commission's 1998 *Universal Service Report to Congress* to support their positions.[10] Some ILECs claim that the Commission implicitly concluded that VoIP services are "telecommunications services," not "enhanced services" and thus subject to ILEC switched access charges. But, the Commission reached no such conclusion. Instead, the Commission created a provisional access charge exemption for phone-to-phone IP telephony, and stated,

> [T]o the extent that we conclude [in future proceedings] that certain forms of phone-to-phone IP telephony are "telecommunications services," and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we ***may*** find it reasonable that they pay ***similar*** access charges.[11]

The Commission thus properly made no final determination of whether "phone-to-phone IP telephony" services are telecommunications services or if they are, whether switched access charges or some other form of intercarrier compensation should apply to those services.

The more candid ILECs concede that the Commission has not found that any forms of phone-to-phone IP telephony are telecommunications services or that such services necessarily are subject to ILEC switched access charges, much less the ILECs' current rates.[12] Some ILECs, nonetheless, rely on the Commission's explanation of "phone-to-phone IP telephony" to characterize AT&T's VoIP services as

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[10] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11,501 (1998).

[11] *Id*. at 11,545, para. 91 (emphasis added).

[12] *E.g.*, Comments of Sprint Corporation at 6-7.

telecommunications services that necessarily should be subject to ILEC switched access charges:

> In using the term "phone-to-phone" IP telephony, we tentatively intend to refer to services in which the provider meets the following conditions: (1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content.[13]

Again, these ILECs' arguments do not comport with the Commission's conclusions. The Commission provided only tentative criteria to describe what it meant by the term "phone-to-phone IP telephony." The Commission did not establish an iron-clad definition to be used for classifying individual services and deliberately did not do so to allow the industry to develop innovative uses of the Internet. Nor did the Commission endorse the ILECs' mechanical view, that if customers perceive the service as providing the same functionality as circuit-switched interexchange voice communication, that service should be subject to ILEC switched access charges. The tentative nature of the Commission's criteria, in conjunction with its provisional exemption of IP telephony services from switched access charges, confirms the Commission's justified caution in extending obligations to pay significant intercarrier compensation on developing and technologically innovative services. Indeed, application of the Commission's tentative criteria could adversely affect or preclude the very services that Congress and the Commission are attempting to foster.

[13] *Universal Service Report to Congress*, 13 FCC Rcd at 11,543.

Wireless services provide an apt example of the types of problems inherent in the ILECs' procrustean approach. Third generation ("3G") wireless services are only now being deployed, and those services are intended to allow subscribers both to make voice calls and to access the Internet from the same wireless device (though wireless calls to the Internet may not pass over ILEC facilities). Some of these devices look more like phones, while others look more like Palm Pilot or other "data-centric" devices. Such technology blurs, if not eliminates, the distinction between computer and telephone for purposes of enabling voice and data communications. Yet, one of the Commission's tentative criteria for determining whether a service constitutes "phone-to-phone IP telephony" is that the service "does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call." Because 3G and other wireless handsets can be used both for voice calls and Internet access, application of this criterion to 3G service could result in wireless Internet access being classified as "phone-to-phone IP telephony." Such a result would be directly at odds with Commission policy and past decisions on both Internet access and wireless communications.

Other emerging services – both wireline and wireless – undoubtedly will also feature a melding of data and voice communications, including real-time audio/video communication and the ability to place a voice call in conjunction with accessing websites on the Internet. Such services also could be classified, in whole or in part, as "phone-to-phone IP telephony" under the Commission's tentative criteria. Indeed, the "customer perception" litmus test that the ILECs would have the Commission adopt in determining when switched access charges should apply would be meaningless in a world where the distinctions between voice and data transmission are rapidly disappearing and "customer perception" is evolving accordingly. At a minimum, the extension of switched access charges in such a world threatens to make new services prohibitively expensive, and at worst, such an extension could postpone, if not eliminate, development and deployment of innovative technologies and services.

The ILECs, as *de facto* monopoly service providers, have little interest in facilitating new telecommunications technologies and services, particularly if those technologies and services decrease the value or utility of the ILECs' investment in their embedded networks. The ILECs' sole demonstrated concern is with ensuring that they maintain or increase their historic revenue flows. Such a "show me the money" mentality, however, is fundamentally inconsistent with the Commission's commitment to fostering not only effective competition among existing services, but the development and rapid availability of new and innovative services. Switched access charges, as the Commission tentatively concluded in the intercarrier compensation docket, currently represent an inefficient burden on competition and consumers. The Commission should not compound these existing negative influences by extending, or threatening to extend those charges to nascent services.

CONCLUSION

For the foregoing reasons, if the Commission does not grant AT&T's Petition, the Commission should also deny the ILECs' requests that the Commission declare VoIP services as telecommunications services subject to imposition of ILEC switched access charges.

Respectfully submitted,

AT&T Wireless Services, Inc.

/s/

Douglas I. Brandon
Vice President – Legal and External Affairs
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W., 4th Floor
Washington, DC 20036
Tel. (202) 223-9222

Daniel Waggoner
Suzanne Toller
Gregory Kopta
Davis Wright Tremaine LLP
1501 Fourth Avenue, Suite 2600
Seattle, WA 98101
Tel.: (206) 622-3150
Fax: (206) 628-7699

Attorneys for AT&T Wireless Services, Inc.

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